82-2127

IN THE

# Supreme Court of the United States

October Term, 1982

WILLIAM A. MERTSCHING,
*Petitioner,*
v.
UNITED STATES OF AMERICA,

As reported in:
WILLIAM A. MERTSCHING,
*Plaintiff-Appellant,*
v. No. 82-2016
UNITED STATES OF AMERICA,
*Defendant-Appellee,*
and
WILLIAM A. MERTSCHING,
*Plaintiff-Appellant,*
v. No. 82-2485
UNITED STATES OF AMERICA,
*Defendant-Appellee.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WILLIAM A. MERTSCHING
*Petitioner/Pro Se*
1224 Bannock Street
Denver, Colorado 80204
(303) 623-3490

## QUESTIONS PRESENTED FOR REVIEW

Is not review warranted when questions of law have not yet been ruled on?

Is not review warranted when decisions of the Supreme Court of the United States have been ignored?

Is not review warranted when petitioner's actions are controlled by Grand Jury investigations, and statutory required court filings over which petitioner has not control?

Is not review warranted when prior court cited case law includes memorandum decisions of legislative courts?

## PARTIES TO THIS PROCEEDING

The caption of this case, as presented, contains the names of all parties.

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## TABLE OF CITATIONS

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

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WILLIAM A. MERTSCHING,

Petitioner,

v.

UNITED STATES OF AMERICA,

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As reported in:

WILLIAM A. MERTSCHING,

Plaintiff-Appellant,

v. NO. 82-2016

UNITED STATES OF AMERICA,

Defendant-Appellee,

and

WILLIAM A. MERTSCHING,

Plaintiff-Appellant,

v. NO. 82-2485

UNITED STATES OF AMERICA,

Defendant-Appellee,

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The Petitioner prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit entered on April 12, 1983.

## CITATIONS TO OPINIONS BELOW

The Opinion of the United States Court of Appeals Tenth Circuit is Slip Opinion, and is set out in Appendix A infra at P. A1.

## JURISDICTION

The Judgment of the Tenth Circuit was entered on April 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1291 and 28 U.S.C. Sec. 1651(a).

## STATEMENT OF THE CASE

The Petitioner here was a statutorily mandated plaintiff, originally in the United States District Court for the District of Colorado. An appeal to the Court to Appeals for the Tenth Circuit resulted in one opinion, see infra Appendix A. The United States District Court for the District of Colorado issued no opinion in either case, and only issued a combined Findings of Fact and Conclusions of Law after No. 82-2016 was in appeal, none of which are included in the Opinion of the Tenth Circuit (see Appendix B).

## REASONS FOR GRANTING THE WRIT

The wording of the Constitution of the United States has not changed since its adoption in 1776, nor has any of the wording of the first nine amendments, constituting the Bill of

Rights, been changed since their adoption.

The Supreme Court of the United States has continuously stated its agreement as to what these words of the Constitution of the United States do say. There is no reason to believe that the meaning of these words have changed.

The Supreme Court of the United States early held that the Fourth and Fifth Amendments applied to both civil and criminal cases. The actual language of the Supreme Court can be found in Boyd v. United States, 116 U.S. 616, 629, 630, 6 S. Ct. 524, 531, 532, 29 L.Ed. 746 (1886). The Supreme Court said in Norwood v. Harrison, 413 U.S. 455, 37 L Ed 2d 723, 93 S. Ct. 2804 "No one can be required, consistent with due process, to prove the absence of violation of law."

The importance and purpose of the Constitution was clearly made by Jefferson who said, "Let no more be said of confidence in man, but bind him down with the chains of the Constitution." Those chains were meant to apply to all who wield the delegated powers of government including the Courts.

Petitioner points out to this Court that the Sixteenth Amendment does not include any enforcement provisions, but as the Supreme Court has stated many times, that "income subject to taxation under the Corporation Excise Tax Act of 1909 and under the 16th Amendment is the same," "that only income (gain) is taxable without apportionment, nothing else."

In Eisner v. Macomber, 252 U.S. 189 (1920) the Supreme Court is quoted as follows "Congress may not, by

any definition it may adopt, conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone, that power can be lawfully exercised." 40 S.Ct. at 193.

CONCLUSION

The Motions to Dismiss should not have been granted until the Questions of Law had been adjudicated. Especially since the Supreme Court ruling as late as 1973 that "no one can be required, consistent with due process, to prove the absence of violation of law."

The basic question is whether or not the statute which Congress did enact will permissibly bear a construction rendering it free from constitutional defects. The Court must consider

possible applications besides the one at Bar. It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes. The petitioner has a hazard of being prosecuted for knowing but guiltless behavior.

For the reasons set forth herein, the Petitioner respectfully prays that this Honorable Court will grant the Writ to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted

WILLIAM A. MERTSCHING
Petitioner/Pro-Se
1224 Bannock Street
Denver, Colorado 80204

(303) 623-3490

# APPENDIX

4-12-83 82-2016

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Tenth Circuit

Slip Opinion

APPENDIX A

F I L E D
United States Court
of Appeals Tenth
Circuit
Apr. 12, 1983
HOWARD K. PHILLLIPS
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

| | | |
|---|---|---|
| WILLIAM A. MERTSCHING, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | |
| | ) | |
| v. | ) | No.82-2016 |
| | ) | |
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Defendant-Appellee. | ) | |

Appeal from the United States
District Court
For the District of colorado
(D. C. No. 81-K-1391)

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

William A. Mertsching, pro se.

Glen L. Archer, Jr., Assistant Attorney General, Michael L. Paup, Carleton D. Powell, and Murray S. Horwitz, Attorneys, Tax Division, Department of Justice, Washington, D.C. for Defendant-Appellee.

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Before SETH, Chief Judge, BARRETT and MCKAY, Circuit Judges.

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PER CURIAM.

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This three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed.R.App.P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

William A. Mertsching appeals a federal district court order dismission his 26 U.S.C. § 6694(c)[1] suit

1. Where a tax preparer wishes to have refunded penalties assessed for the negligent or intentional disregard of revenue rules, 26 U.S.C. § 6694(c)(2) requires him to initiate a proceeding in the district court for a determination of his liability.

against the United States for failing to comply with a discovery order.

In December 1980, Mr. Mertsching, a tax preparer as defined by 26 U.S.C. § 7701(a)(36), was assessed two $100 penalties by the Internal Revenue Service (IRS) under 26 U.S.C. § 6694(a) for negligently or intentionally disregarding revenue rules and regulations in preparing tax returns. The IRS contended that the penalties were imposed because Mr. Mertsching prepared returns which sought to assign income to third persons by means of family equity trusts. Such assignments have been disallowed under established case law.[2] Following the procedures set forth in 26 U.S.C. § 6694(c), Mr. Mertsching paid

2. Gran v. Comm'r, 664 F.2d 199 (8th Cir. 1981); Vnuk v. Comm'r, 621 F.2d 1318 (8th Cir. 1980); Markosian v. Comm'r, 73 T.C. 1235 (1980); Wesenberg v. Comm'r, 69 T.C. 1005 (1978).

fifteen percent of the assessed penalties and filed the instant action for a determination of his liability.

On June 15, 1982 the United States served a notice of deposition upon Mr. Mertsching. Mr. Mertsching filed an objection to the request for deposition contending that the penalties were imposed arbitrarily, that 26 U.S.C. § 6694 was facially unconstitutional, and that a deposition would violate his Fifth Amendment right against self-incrimination. The court did not rule on the motion prior to the scheduled deposition. Consequently, Mr. Mertsching appeared at the deposition but asserted the Fifth Amendment and refused to answer any questions.

Thereafter, the United States filed a motion to compel discovery. After conducting a hearing on the issue,

the court granted the motion and advised Mr. Mertsching that the case would be dismissed if he did not appear and respond to questions during the deposition.

Despite the admonition, Mr. Mertsching refused to answer any questions during the rescheduled deposition. Consequently, the United States moved to dismiss the suit for failure to comply with the court's discovery order. The court again conducted a hearing during which Mr. Mertsching testified that he could not be compelled to be a witness against himself. The court granted the motion and dismissed the case with prejudice.

If a party fails to obey a court order to provide discovery, the court may dismiss the action. Fed.R.Civ.P. 37(b)(2)(C). The imposition of sanctions is within the trial

court's discretion and will not be disturbed on appeal unless the court has abused its discretion. Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976); Brown v. McCormick, 608 F.2d 410 (10th Cir. 1979).

Mr. Mertsching contends, inter alia, that the 26 U.S.C. § 6694(c) proceeding is criminal in nature and that, therefore, the Fifth Amendment right against self-incrimination was available to insulate him from deposition. The Supreme Court has held that the right against self-incrimination applies only in situations where a responsive answer to the question or an explanation of why it cannot be answered would expose the claimant to prosecution for a federal crime. Hoffman v. United States, 341

U.S. 479 (1951). Mr. Mertsching fears prosecution only under 26 U.S.C. § 6694. However, the penalties set forth in § 6694(a) are civil, not criminal, penalties. The legislative history of 26 U.S.C. § 6694 indicates that the statute was to be interpreted in a manner similar to 26 U.S.C. § 6653 which imposes penalties for the intentional or negligent disregard of rules and regulations by taxpayers on their own returns. 1976 U.S. Code Cong. & Ad. News (94 Stat.) 4188. The courts have consistently interpreted the § 6653 proceeding and penalties as civil in nature. Considine v. United States, 683 F.2d 1285 (9th Cir. 1982); Raley v. Commissioner, 676 F.2d 980 (3d Cir. 1982); Gilbert v. Commissioner, 675 F.2d 1083 (9th Cir. 1982); United States v. University Savings Association, 666 F.2d

312 (5th Cir.), cert. denied, 102 S.Ct. 2905 (1982); Fontneau v. United States, 654 F.2d 8 (1st Cir. 1981); Ruidoso Racing Association, Inc. v. Commissioner, 476 F.2d 502 (10th Cir. 1973). The § 6694 proceeding and penalties, then, too are civil. Accordingly, the fifth Amendment was not properly invoked by Mr. Mertsching, and the district court did not abuse its discretion in dismission the action.

We have reviewed Mr. Mertsching's additional contentions and find them to be without merit.

AFFIRMED. The mandate shall issue forthwith.

APPENDIX B

F I L E D
United States District Court
Denver, Colorado
Jan. 26, 1983
JAMES R. MANSPEAKER
Clerk
By.....

United States Court of Appeals
Tenth Circuit
Office of the Clerk
C404 United States Courthouse
Denver, Colorado 80294

HOWARD K. PHILLIPS
Clerk

Telephone
(303) 837-3157
(303) 327-3157

Mr. James R. Manspeaker
Clerk, U.S. District Court
Room C-145
U.S. Courthouse
Denver, CO 80294

Re: 82-2485, Mertsching v. U.S.A.
(D.Ct. #80-1535-K)

Dear Mr. Manspeaker:

Enclosed is a certified copy of an order entered to day dismissing the captioned case pursuant to Rule 15 of the Rules of the United States Court of Appeals for the Tenth Circuit. This shall constitute the mandate of this

Court. You will file this mandate in the records of your Court immediately upon receipt of it by direction of this Court.

Enclosed is a receipt for you to sign and return to this office.

Yours very truly,

HOWARD K. PHILLIPS, Clerk

slg
Enclosures
cc: Cecil A. Hartman, Attorney, 180 East Hampden #214, Englewood, CO 80110
William Bower, Tax Division, Department of Justice, Washington, D.C. 20530

ENTERED
ON THE DOCKET

Jan 26, 1983

JAMES R. MANSPEAKER
CLERK
By.....

A true copy
Teste

Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit

By

_____
Deputy Clerk

No. 82-2485

NOVEMBER TERM - JANUARY 26, 1983

Before Howard K. Phillips, Clerk

WILLIAM A. MERTSCHING,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

It is ordered that the captioned appeal is hereby dismissed for lack of prosecution pursuant to Rule 15 of the Rules of the United States Court of Appeals for the Tenth Circuit.

HOWARD K. PHILLIPS, Clerk

No. 82-2127

# In the Supreme Court of the United States

OCTOBER TERM, 1983

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WILLIAM A. MERTSCHING, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## TABLE OF AUTHORITIES

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# In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2127

WILLIAM A. MERTSCHING, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the decision below affirming the dismissal of his tax refund suit for failure to comply with the district court's discovery order.

1. Petitioner is an income tax return preparer as defined by Section 7701(a)(36) of the Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)). Section 6694(a) of the 1954 Code provides that "[i]f any part of any understatement of liability with respect to any return * * * is due to the negligent or intentional disregard of rules and regulations by any person who is an income tax return preparer * * *, such person shall pay a penalty of $100 with respect to such return * * *." In December 1980, petitioner was assessed two $100 penalties by the Internal Revenue Service (IRS) under Section 6694(a) of the 1954 Code. The penalties were imposed because petitioner prepared returns for persons claiming to have assigned their incomes to third persons by

means of so-called "family equity trusts." Those arrangements uniformly have been held to be ineffective for federal tax purposes.[1] Following the procedures set forth in Section 6694(c) of the 1954 Code, petitioner paid 15% of the assessed penalties and filed the instant refund action (Pet. App. A3-A4).

On June 15, 1982, the government served a notice of deposition upon petitioner. Petitioner filed a motion to quash, contending that Section 6694 was facially unconstitutional and that the compelled answer to any questions concerning his activities would violate his Fifth Amendment right against self-incrimination. Thereafter, the government filed a motion to compel discovery. After a hearing, the district court granted the motion and advised petitioner that his case would be dismissed if he did not appear and respond to questions during the deposition (Pet. App. A4-A5).

Despite the admonition, petitioner refused to answer any questions during the rescheduled deposition, including questions concerning his occupation and business address. Consequently, the government moved to dismiss the suit for failure to comply with the district court's discovery order. The district court again conducted a hearing during which petitioner asserted that he could not be compelled to be a witness against himself. The district court then dismissed the case with prejudice (Pet. App. A5). The court of appeals affirmed, holding that the district court did not abuse its discretion in imposing the dismissal sanction pursuant to Fed. R. Civ. P. 37(b)(2)(C) (Pet. App. A1-A8).

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[1]See, *e.g.*, *Schulz* v. *Commissioner*, 686 F.2d 490 (7th Cir. 1982); *Gran* v. *Commissioner*, 664 F.2d 199 (8th Cir. 1981); *Markosian* v. *Commissioner*, 73 T.C. 1235 (1980).

2. Petitioner apparently contends (Pet. 3-7) that dismissal was improper here because his failure to comply with discovery was grounded on the assertion of the Fifth Amendment privilege against self-incrimination. As the court of appeals held, however, there was no basis here for invoking the Fifth Amendment.

The privilege against self-incrimination may be asserted in a civil proceeding (see, *e.g.*, *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973)), but it may be asserted only with respect to a substantial apprehension of threatened criminal sanctions. Thus, if the claimant's apprehension arises from the imposition of sanctions that are remedial and civil in nature, the privilege is not available. See *Johnston* v. *Herschler*, 669 F.2d 617, 619 (10th Cir. 1982); *Devine* v. *Goodstein*, 680 F.2d 243, 246-247 (D.C. Cir. 1982); see also *Lefkowitz* v. *Turley, supra*, 414 U.S. at 77, 84.

Petitioner's argument that the penalty of Section 6694(a) is in the nature of a criminal sanction, and hence that he was entitled to invoke the Fifth Amendment to avoid exposing himself to that penalty, is without merit. Whether a penalty is civil or criminal is a matter of statutory construction. The initial inquiry focuses upon whether Congress has expressly or impliedly indicated a preference for one or the other. Further, assuming an intention to create a civil penalty, it must be determined if the statutory scheme is so punitive as to override that intention. *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980).

Section 6694(a) was added to the 1954 Code as part of the Tax Reform Act of 1976, Pub. L. No. 94-455, Section 1203(b)(1), 90 Stat. 1687, to curb the number of inaccurate tax returns filed through paid tax return preparers. Staff of the Joint Committee on Taxation, 94th Cong., 2d Sess., *General Explanation of the Tax Reform Act of 1976*, 346, *reprinted in* [2] 1976-3 Cum. Bull. 358. Section 6694(a) "is

* * * to be interpreted in a manner similar to the interpretation given the provision under present law (sec. 6653(a)) relating to the disregard of rules and regulations by taxpayers on their own returns." *General Explanation of the Tax Reform Act of 1976, supra*, at 351, *reprinted in* [2] 1976-3 Cum. Bull. 363.

It is settled that the penalty provision of Section 6653(b) of the 1954 Code providing for a 50% addition to tax for fraud is a civil penalty. *Helvering* v. *Mitchell*, 303 U.S. 391, 401-404 (1938). If Section 6653(b), which prescribes more stringent penalties than Section 6653(a), is civil in nature, it is clear that Section 6653(a) must also be considered civil in nature. Hence, Congress' reference to Section 6653(a) in discussing Section 6694(a) indicates that the latter section is intended to be considered a civil remedy. And the extraction of a $100 penalty for each negligently prepared return manifestly is not so punitive as to override that intention. Because the Fifth Amendment privilege does not apply with respect to the imposition of civil sanctions, there was no basis for petitioner to invoke it when the government sought to depose him.[2]

Similarly, contrary to petitioner's apparent contention (Pet. 4), the Section 6694(a) penalty does not constitute the type of forfeiture that is considered criminal under *Boyd* v. *United States*, 116 U.S. 616, 634 (1886). In order for the Fifth Amendment privilege to extend to civil forfeiture proceedings, the statute involved must contemplate imposing a penalty only upon those significantly involved in a

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[2]Even if we assume the sanctions involved were criminal in nature, petitioner's blanket assertion of the privilege was unwarranted. The determination of the merit of claims of privilege is for the trial court, and therefore the privilege can properly be claimed only on a question by question basis. Thus, a blanket claim of privilege cannot be countenanced. See *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951); *United States* v. *Sullivan*, 274 U.S. 259, 263-264 (1927); *United States* v. *Davis*, 636 F.2d 1028, 1038 (5th Cir. 1981).

criminal enterprise. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 688 (1974); *United States* v. *United States Coin & Currency*, 401 U.S. 715, 721-722 (1971). Thus, if the forfeiture penalty is closely tied to or the equivalent of a criminal sanction, it is arguable that the Fifth Amendment privilege is available. Here, however, the penalty assessed against petitioner arises from the preparation of tax returns and is purely remedial. Its imposition obviously is not in the nature of a criminal forfeiture. See, *e.g.*, *Plunkett* v. *Commissioner*, 465 F.2d 299, 303 (7th Cir. 1972). In sum, the court of appeals clearly was correct in holding that the district court did not abuse its discretion in imposing the dismissal sanction. See, *e.g.*, *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

JULY 1983